International Competition Network
Unilateral Conduct Working Group
Questionnaire

Agency Name: Japan Fair Trade Commission
Date: November 11, 2009

Refusal to Deal

This questionnaire seeks information on ICN members' analysis and treatment under their antitrust laws of a firm's refusal to deal with a rival. The information provided will serve as the basis for a report that is intended to give an overview of law and practice in the responding jurisdictions regarding refusals to deal and the circumstances in which they may be considered anticompetitive.

For the purposes of this questionnaire, a "refusal to deal" is defined as the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival. This typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market. For the purposes of this questionnaire, a refusal to deal also covers actual and outright refusal on the part of the dominant firm to license intellectual property (IP) rights, or to grant access to an essential facility.

The questionnaire also covers a "constructive" refusal to deal, which is characterized, for the purposes of this questionnaire by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability). Another method of constructive refusal to deal may be accomplished through a so-called "margin-squeeze," which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete.

This questionnaire, as well as the planned report, does not encompass conditional refusals to deal with rivals. In the case of a conditional refusal, the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements (see the recent reports of this Working Group, in particular the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008)).

You should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc. Responses will be posted on the ICN website.

General Legal Framework

1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.

Under the Antimonopoly Act, a "refusal to deal" may be a violation as "exclusionary private monopolization" or "unfair trade practices."

Exclusionary private monopolization is defined under the Antimonopoly Act as follows: "business activities …… by which any entrepreneur excludes …… the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade." For example, if an entrepreneur refuses to supply beyond reasonable degree, in the upstream market where it provides products necessary for other entrepreneurs to engage in their business activities in the downstream market, and causes difficulty to the business activities of the entrepreneurs in the downstream market, resulting in substantial restraint of competition in a particular field of trade (or downstream market here) (Note 1), such refusal to supply will be regulated as exclusionary private monopolization.

Further, a refusal to deal specified in the notification of the Japan Fair Trade Commission as a typical case of unfair trade practices is defined to be "Unjustly refusing to trade, or restricting the quantity or substance of goods or services pertaining to trade with a certain entrepreneur, or causing another entrepreneur to undertake any act that falls under one of these categories." In other easily understandable words, a refusal to deal is judged illegal (1) if an entrepreneur thereby excludes its competitor or a competitor of other entrepreneurs having close relations with it from trade opportunities, which tends to make such competitors' business activities difficult or (2) if such refusal is used as a means to achieve any illegal or unjust purposes under the Antimonopoly Act.

Speaking about their relation, "unfair trade practices" is basically considered as preventive regulation of private monopolization. In short, a refusal to deal as exclusionary private monopolization requires a higher effect as requisite: substantial restraint of competition in a particular field of trade. On the other hand, as unfair trade practice, refusal to deal can be regulated even when there is only tendency to impede fair competition, where influence on the competition is not as much as substantial restraint of competition.

When judging whether to regulate a refusal to deal as exclusionary private monopolization or unfair trade practice, whether the refusing entrepreneur is a dominant firm or not, or a firm with substantial market power or not is not requisite. It is always judged based on the degree of influence to the competition. Nevertheless, any act by a dominant firm or a firm with substantial market power is considered to have a large influence to the competition in the market, and thus, if such firm makes a refusal to deal, then it is possible that such act is treated as exclusionary private monopolization.

(Note 1) "A substantial restraint of competition in any particular field of trade" under Article 2, Paragraph 5 of the Antimonopoly Act is understood to form, maintain, or enhance the situations where there are fewer competitions and a particular entrepreneur or entrepreneur group can, at its discretion, freely change the prices, quality, quantity, and other conditions to some extent, and thereby control the market, according to the case law (Tokyo High Court Case on May 29, 2009).

(Note 2) If ordinary business activities of the entrepreneur whose deal is refused tend to become difficult, it is judged that such refusal to deal tends to impede fair competition. In this case, such act could be considered as an unfair trade practice, which constitutes a violation against the Antimonopoly Act.

2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?

Statutory provisions and legal basis of regulations pertaining to refusal to deal are, as shown below.

■Law: Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act)

○ First part of Article 3 (Prohibition of private monopolization)
No entrepreneur shall effect private monopolization .....

○ Article 2, Paragraph 5 (Definition of private monopolization)
The term "private monopolization," as used in this Act means such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

○ Article 19 (Prohibition of unfair trade practices)
No entrepreneur shall employ unfair trade practices.

○ Article 2, Paragraph 9 (Definition of unfair trade practices)
The term "unfair trade practices," as used in this Act means any act falling under any of following items:

vi. In addition to the above items, this term means any act falling under any of the following items, which tends to impede fair competition and which is designated by the Fair Trade Commission:

b. Unjustly treat other entrepreneurs in a discriminatory manner;

■Notice: Unfair Trade Practices

(2) Unjustly refusing to trade, or restricting the quantity or substance of goods or services pertaining to trade with a certain entrepreneur, or causing another entrepreneur to undertake any act that falls under one of these categories.

(3) In addition to the acts falling under Article 2 (9) ii) of Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the "Act"), unjustly supplying or accepting goods or services for a consideration, which discriminates between regions or between parties.

(4) Unjustly affording favorable or unfavorable treatment to a certain entrepreneur in regard to the terms or execution of a trade.

■ Guidelines

- Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act
- Guidelines for the Use of Intellectual Property under the Antimonopoly Act

- Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act
- Guidelines for Promotion of Competition in the Telecommunications Business Field
- Guidelines for Proper Electric Power Trade
- Guidelines for Proper Gas Trade etc.

3. Do the relevant provisions apply only to dominant firms or also to other firms?

The parties conducting exclusionary private monopolization or unfair trade practices are not limited to dominant firms or firms with substantial market power in the provisions of the Act.

As described above, "Tendency to impede fair competition" is required for regulation of a refusal to deal as an unfair trade practice. When a dominant firm or a firm with substantial market power makes a refusal to deal, it would not be easy for the counterparty to find another substitutive firm for deal, and the counterparty's ordinary business activities tend to become difficult. It is possible that such act would cause tendency to impede fair competition. Further, when a dominant firm or a firm with substantial market power makes a refusal to deal, it is possible that such firm's act would "substantially restrain competition in a particular field of trade," i.e., it forms, maintains, or enhances such firm's power to control the market.

Thus, when a dominant firm or a firm with substantial market power makes a refusal to deal, compared with a case of such refusal by other firms, there is a higher possibility that such act is regulated as exclusionary private monopolization or an unfair trade practice.

4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?

■civil／administrative violation

A person may, when a certain refusal to deal constitutes an unfair trade practice and tends to infringe his or her interest , seek an injunction suspending such act (Article 24). In addition, the party taking such act of exclusionary private monopolization or unfair trade practices shall be liable for damages suffered by another party. (Article 25).

When a refusal to deal constitutes exclusionary private monopolization, it is subject to a cease and desist order and order for surcharge payment.

On the other hand, when a certain refusal to deal is regulated as an unfair trade practice, it is subject to a cease and desist order but is not subject to surcharge payment order.

■Criminal violation

When a certain refusal to deal is judged to be exclusionary private monopolization and the JFTC criminally accuses the refusing party, such party can be subject to a criminal punishment (imprisonment with work for not more than five years or a fine of not more than 5 million yen against a natural person, and/or a fine of not more than 500 million yen against a judicial person). Note that, however, the Japan Fair Trade Commission (JFTC) has never made a criminal accusation in relation to exclusionary private monopolization.

When a refusal to deal is judged to be an unfair trade practice, mere taking of such act is not subject to criminal sanction.

If any party, which had violated regulations in relation to exclusionary private monopolization and unfair trade practices and has been subject to a cease and desist order, breaches the determined cease and desist order, it shall be subject to imprisonment with work for not more than two years or a fine of not more than three million yen (if the party is a natural person) and/or a fine of not more than 300 million yen (if the party is a judicial person).

Experience

5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?

   3 cases

6. In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.

   2 cases (one of them is a case of margin squeeze)

   Anticompetitive Effects: Nipro Corporation case

   To Naigai Glass Industry Co., Ltd. dealing competitive imported products, Nipro Corporation refused to supply material glass tubes for ampoules of the same type as imported ones made by Nippon Electric Glass Co., Ltd. and changed trade conditions for such products. Nipro Corporation, already having power to control the market as an exclusive supplier of material glass tubes for ampoules made by Nippon Electric Glass in the material tube supply market in the western part of Japan, took such act against Naigai group to restrain continued or expanded dealing of imported material tubes and to impose a sort of sanction to Naigai. Nipro Corporation intended to restrict or suppress import of material tubes by influential competitors, and thereby, to avoid situations where quality and price competitions are caused or possibly caused. This substantially restrained competition in the field of supplying material tubes in the western part of Japan.

   For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

   administrative system: 2 cases (Nipro Corporation case and NTT East case, as described later. In NTT East case among them, a party concerned (NTT East) followed hearing proceedings by the JFTC and raised litigation at the Tokyo High Court, rescinding the decision of the JFTC. This

case was dismissed by Tokyo High Court on May 29, 2009. It is being appealed to the Supreme Court.

judicial system: Not applicable.

Please state whether any of these cases were brought using criminal antitrust authority.

Not applicable.

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

Nippon Telegraph and Telephone East Corporation (NTT East) set the user charge of a particular broadband service via optical fiber for detached houses at 5,800 yen per month at first and at 4,500 yen per month from April 1, 2003. These prices were lower than the connection charge required to other telecommunications entrepreneurs for providing the broadband services with connection to the optical fiber facilities of NTT East.

Considering that an entrepreneur that intends to newly start the business of broadband service with making connection with the subscriber optical fiber facilities held by NTT East needs to set a user charge higher than the connection charge payable to NTT East to expect continued and rational operation of business, it could be decided that the act by NTT East made it difficult for other telecommunications entrepreneurs, which did not hold any subscriber optical fiber facilities, to start the broadband service business for detached houses with making connection to NTT East's subscriber optical fiber facilities and thereby excluded such business by other entrepreneurs.

Thus, the JFTC decided that the above act by NTT East fell under the private monopolization, which was in violation of the provision under Article 3 of the Antimonopoly Act.

7. Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.

There are two types of civil litigation against a refusal to deal in accordance with the Antimonopoly Act. One is to seek injunction applicable to unfair trade practices, and the other, is to file a damages suit applicable to both of private monopolization and unfair trade practices.

In a lawsuit to seek injunction, any person whose interest is infringed or is likely to be infringed by a violation constituting an unfair trade practice may, when such infringement causes or is likely to cause a remarkable damage, request for suspension or prevention of such infringement against the entrepreneur, etc.

The damages suit can be filed only to the cases where the JFTC issued cease and desist orders, and in the suit liability is assumed even if an entrepreneur proves non existence of intension or negligence (Lawsuit to claim compensation for damage may also

be raised under the civil code. Such lawsuits are not limited to the cases where the JFTC has issued cease and desist orders).

As far as the JFTC knows, no lawsuit to seek injunction or to claim compensation for damage resulting from refusal to deal has been raised recently.

Evaluation of an actual refusal to deal

8. What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.

    a. What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?

    b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?

    c. Does intent play a role, and if so what role and how is it demonstrated?

    d. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?

    e. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

To judge a refusal to deal to be an exclusionary private monopolization or unfair trade practice, it is not necessary that business activities of other entrepreneurs are completely excluded from the market or new entry is completely impeded in the reality.

a. When it is judged probable that the refusal to deal would make continuity of business activities of other entrepreneurs difficult or make start of business by a new entrepreneur difficult and it is found that the act causes a substantial restraint of competition in a particular field of trade, such act is regulated as an exclusionary private monopolization. Even if the situations do not go so far, an act which has a tendency to impede fair competition is regulated as an unfair trade practice.

b. When a refusal to deal is regulated as an exclusionary private monopolization or unfair trade practice, infringement of consumers' interest is not a legal requisite.

c. The acting party's intent to exclude business activities of the entrepreneur subject to the refusal to deal or to make them difficult is not an indispensable requisite to judge its act to be an exclusionary private monopolization or unfair trade practice. However, intent of exclusion as a subjective element can be one of the factors to judge whether the act is an exclusionary private monopolization or unfair trade practice.

d. History of deal is not considered as a direct requisite of exclusionary private monopolization or unfair trade practices. However, there may be a lower possibility that a refusal of an offer for a new deal due to agreement not being achieved on trade conditions,

for example, is judged to be a violation when compared with stop of deal with a counterparty with which trade has been continued.

e. In case of exclusionary private monopolization, no matter whether the acting party is competing with the counterparty or not, any act judged to be a substantial restraint of competition in a particular field of trade is treated as a violation. Similarly, any act is treated as an unfair trade practice when the act tends to impede fair competition, no matter whether the acting party is competing with the counterparty or not.

9. Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.

   If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

The Antimonopoly Act does not have any particular provision on essential facilities such as imposing of connection obligations. However, in case of "facilities which are indispensable to provide telecommunication services, but which are judged practically difficult to be newly constructed by making investment" in the field of telecommunications business, for example, refusal to supply such goods required for business activities by buyer-entrepreneurs in the market (downstream market) or refusal of access to such goods could possibly be a problem of exclusionary private monopolization or unfair trade practices.

For example, a telecommunications business entrepreneur has facilities indispensable in providing telecommunications services, and it is practically difficult to newly construct similar facilities by making investment. If such entrepreneur refuses connection with its subscriber line network by or colocation deal with other telecommunications entrepreneurs or treats them unfavorably in the deal conditions or implementation when compared with itself or its affiliate entrepreneurs, such attitude impedes new entry of other telecommunications entrepreneurs to the market and makes their smooth business activities difficult. If it substantially restrains competition in the market, it is treated as exclusionary private monopolization. Even when the act does not substantially restrain competition in the market, it is regulated as unfair trade practices if it tends to impede fair competition.

10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

    a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?

    b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?

The basic concept to judge whether a refusal to deal is an exclusionary private monopolization or unfair trade practice in violation of the Antimonopoly Act does not differ depending on whether such act is related to the intellectual property right. On the other hand, considering the special characteristics of the intellectual property right, the JFTC has publicly announced "Guidelines for the Use of Intellectual Property under the Antimonopoly Act" to clarify what type of acts in relation to the intellectual property are considered as problems under the Antimonopoly Act. For example, when many entrepreneurs use certain technology

as the base of their business activities in the product market, if some licensees obtain the right from the party holding the right in such technology and refuses to grant sublicense to other competing licensees so as to avoid their use of such technology, such act may be judged to be an unfair trade practice. (If, as a result of this act, competition in a particular field of trade is substantially restrained, such act is also judged to be an exclusionary private monopolization).

Note that, the above guidelines do not distinguish the concept under the Antimonopoly Act between several types of intellectual properties (whether the properties are patents or trade secrets, for example).

Further, if a certain entrepreneur refuses without appropriate reason to provide necessary information to another entrepreneur that manufactures products operating on its product having a dominant market share and, as a result, the latter entrepreneur's product becomes less competitive and its business activities become difficult, for example, such act is regulated as an unfair trade practice or exclusionary private monopolization.

11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

The basic concept to judge whether a refusal to deal is an exclusionary private monopolization or unfair trade practice in violation of the Antimonopoly Act does not differ depending on whether such act is taken in the regulated industries or not. On the other hand, considering the characteristics of the regulated industries, the JFTC has publicly announced "Guidelines for Proper Electric Power Trade," "Guidelines for Proper Gas Trade," "Guidelines for Promotion of Competition in the Telecommunications Business Field," and so on. These guidelines clarify the concept in the Antimonopoly Act in relation to the regulated industry with showing specific examples. If, while a general electric power supplier has sufficient supply capacity and has wholesale trade with other general electric power suppliers, such a supplier refuses to supply all-time backup to a newcomer and restricts the amount of supply or sets inappropriate charge, for example, such act may possibly be treated as exclusionary private monopolization or unfair trade practices because it is concerned to make the business activities of the newcomer difficult.

12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

The basic concept to judge whether a refusal to deal is an exclusionary private monopolization or unfair trade practice in violation of the Antimonopoly Act does not differ depending on whether such act is made by a state-created monopoly. However, if an organization with facilities or the right of use of which was exclusively assigned by the nation or other public entities, is doing business, it would be likely to be difficult for other entrepreneurs to carry out business activities in the downstream market without using such facilities. Therefore, if a state-created monopoly refuses to deal with such other entrepreneur though there is no appropriate reason, it is possible that such act is judged to be an exclusionary private monopolization or unfair trade practice.

Evaluation of constructive refusals to deal

13. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When

determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

In addition to simple refusal to deal, restriction of quantity or substance of the supplied goods or discriminatory treatment of supply conditions or implementation beyond reasonable degree for the goods required in business activities by buyer-entrepreneurs in the market (downstream market) can be also judged to be exclusionary private monopolization or an unfair trade practice. As in the case of other refusal to deal cases, the judgment is basically made from the viewpoint whether the act substantially restrains competition in a particular field of trade or tends to impede fair competition. For example, it is concerned that fair competition is impeded in the following cases: (1) In order to exclude a competitor, an entrepreneur with substantial power discounts goods only for regions and customers for which it competes with such competitor and (2) Discriminatory treatment of trade prices and other trade conditions without any reasonable degree causes a direct and serious influence to the counterparty subject to discrimination, which adversely affects the fair order of competition.

Evaluation of "margin squeeze"

14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

    You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

There are cases where an entrepreneur in the upstream market who supplies products that are necessary for carrying out business activities in the downstream market, also operates in the downstream market. In this case, such entrepreneur may set the price of its products in the upstream market at a level higher than the price of its products in the downstream market or setting prices that are too close for trading customers to respond by economically reasonable business activities (so-called margin squeeze). As in the case of ordinary refusal to deal, such action basically becomes subject to regulations as exclusionary private monopolization if such action substantially restrains competition in a particular field of trade and as unfair trade practices if it tends to impede fair competition, respectively. Fair competition tends to be impeded when the business activities of the entrepreneur's competition are likely to be made difficult, when it is concerned that the counterparty of the trade would have quite favorable or unfavorable conditions in competition, or when price setting is used to achieve unlawful or inappropriate purpose under the Antimonopoly Act such as restriction of handling of competitors' goods or prevention of discount sales, for example.

For examples of margin squeeze, refer to Question 6.

Presumptions and Safe Harbors

15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

It is basically free for an entrepreneur to choose which counterparty it trades. Any refusal to deal case is not presumed to be exclusionary private monopolization or unfair trade practices just because the applicable entrepreneur is under particular situations.

If the entrepreneur is a dominant firm, however, refusal to deal in certain cases tends to cause substantial restraint of competition in a particular field of trade or tendency to impede fair competition. In such case, refusal to deal tends to be judged as exclusionary private monopolization or an unfair trade practice.

16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

The JFTC has clarified that when determining whether or not to examine a case as exclusionary private monopolization, it pays attention to the cases where the share of the product that the entrepreneur supplies exceeds approximately 50% after the commencement of such conduct ,and gives priority to examination of such cases. However, this is just an enforcement policy and does not show the safe harbor.

In case of regulations on unfair trade practices, the JFTC considers that if an entrepreneur having a share less than 10% and ranked fourth or below in the market or a newcomer conducts refusal to deal, trade opportunities for competitors would not decrease and alternative counterparty would not be difficult to be found. Therefore, the JFTC considers that the act by such entrepreneur is not found to be unfair trade practices.

Justifications and Defenses

17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

There are special circumstances where defense of efficiency and assurance of consumer interests are approved as justifications in regulations of exclusionary private monopolization.

For defense of efficiency, if it is expected that exclusion by the acting party is accompanied by scale economy, integration of production facilities, specialized plants, reduced transportation costs, or efficient research and development system leading to improvement of productivity, technology innovation, and improvement of business activity efficiency and the acting party will have competitive behavior, the JFTC may take such circumstances into consideration when it determines whether the applicable act substantially restrains competition in a particular field of trade. In this case, efficiency improvement is considered if (1) the efficiency is improved as an effect peculiar to that act and it cannot be brought by other methods that do not restrain competition and (2) such efficiency

improvement causes lower prices of goods, quality improvement, provision of new goods, and other results that are returned to demanders with increasing the welfare of demanders.

Where Exclusionary Conduct assures the interests of general consumers based on safety, health and other justifiable reasons, and promotes the democratic and wholesome development of the national economy, such circumstances may be taken into account exceptionally in the assessment regarding substantial restraint of competition. Namely, if there are special circumstances that can be supported in view of the purpose of promoting fair and free trade to support the democratic and wholesome development of the national economy as well as to assure the interests of general consumer in general as provided in Article 1 of the Antimonopoly Act, the conduct in question may not fall under "substantial restraint of competition".

Also, when judging whether a refusal to deal tends to impede fair competition and falls under the category of unfair trade practices, the JFTC considers the above reasons in determination of whether such refusal has a characteristic to impede fair competition.

Remedies

18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

In all cases, the violating action had been terminated by the time when the JFTC issued its decision, and thus, remedies were not taken.

19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?

When the Antimonopoly Act applies, the same kind of remedy is used for all industries including regulated ones.

20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.

Not applicable.

Policy

21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?

Selection of customers and the establishment of supply conditions independently made by an entrepreneur should be respected as discretion of the entrepreneur. Therefore, it is necessary to carefully judge whether a refusal to deal made individually by an entrepreneur falls under the category of exclusionary private monopolization or unfair trade practices.

In particular, when judging whether the act causes a substantial restraint of competition or has a tendency to impede fair competition, the JFTC considers special circumstances about the position of the acting entrepreneur and the conditions of the competitors, efficiency, and assurance of consumer interests.

Note that the JFTC has determined that it would take quick and strict measures, particularly against misuse of intellectual property rights, competition exclusion in the regulated industry, and unfair trade practices that cause unjustifiable disadvantage for small- and medium-scale enterprises.

22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.

Examples related to refusal to deal in recent years are as follows. Execution against this type of cases is actively conducted in Japan recently.

Table: Examples of Refusal to Deal Cases in Recent Years

Date of Decision	Title	Description	Type
June 5, 2006	Nipro Corporation Case	Material tubes for ampoules	Exclusionary private monopolization
March 26, 2007	Nippon Telegraph and Telephone East Corporation Case	FTTH service for detached houses	Exclusionary private monopolization

Under such circumstances, “Act on Partial Revision of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade” (Act No. 51 of 2009) which includes introduction of surcharges against exclusionary private monopolization passed the 171st Ordinary Diet Session and was enacted on June 3, 2009 and promulgated on June 10. This Act is planned to be enforced on January 1, 2010.

Further, toward enforcement of the Act as revised, the JFTC has publicly issued “Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act” on October 28, 2009 to ensure the transparency of JFTC’s law enforcement and enhance predictability for businesses by clarifying JFTC’s interpretation of the requiremens that constitute exclusionary private monopolization .

The JFTC wishes to assure more foreseeability by accumulating actual cases and deepening discussion.